

BEFORE THE
Federal Communications Commission

WASHINGTON, D.C. 20554

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JUL 29 1994

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Implementation of Section 19 of)
the Cable Television Consumer)
Protection and Competition Act)
of 1992)

CS Docket No. 94-48

Annual Assessment of the Status)
of Competition in the Market)
for the Delivery of Video)
Programming)

ORIGINAL

TO: The Commission

**REPLY COMMENTS
OF THE
NATIONAL RURAL TELECOMMUNICATIONS COOPERATIVE**

**B.R. Phillips, III
Chief Executive Officer**

**Steven T. Berman
Corporate Counsel**

**National Rural
Telecommunications Cooperative**

**John B. Richards
Keller and Heckman
1001 G Street, N.W.
Suite 500 West
Washington, D.C. 20001
(202) 434-4210**

Its Attorneys

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Attachment A: Programming Access Chart

SUMMARY

The Comments of NRTC and other Multichannel Video Programming Distributors ("MVPDs") show that the vertically-integrated cable programming industry continues to stifle competition in the market for delivery of video programming. Many of the basic Program Access problems identified by Congress in the 1992 Cable Act remain uncorrected. The major cable MSOs continue to thwart the potential of DBS, HSD and other competitive technologies by ignoring the Program Access requirements.

As the direct result of exclusivity arrangements between USSB, Time Warner and Viacom, NRTC is unable to obtain access to critical programming (HBO, Showtime, The Movie Channel, Cinemax, MTV, VH-1, Comedy Central, Nickelodeon and Flix) for distribution via DBS. Instead of multiple MVPDs competing vigorously to provide a diversity of service offerings to DBS consumers, as envisioned by Congress, the USSB/Time Warner/Viacom exclusivity deal places the future of DBS solely in the hands of two large vertically-integrated cable programmers and USSB.

The USSB/Time Warner/Viacom arrangement severely restricts consumer choice and creates the most severe competitive problem facing the satellite delivered programming industry. While the cable industry has full access to the programming of Time Warner and Viacom for distribution by cable, HSD, mid-powered DBS (Primestar) and high powered DBS, DirecTV and NRTC are

blocked from obtaining the same programming for distribution via DBS. Ultimately, DBS consumers will pay the price in inconvenience and higher retail rates and DBS will suffer as an alternative distribution technology and a competitive force to cable.

Nor has NRTC been able to obtain the programming of large, vertically-integrated C-Band programming distributors at fair and non-discriminatory prices. As a C-Band distributor, NRTC is routinely required to pay significantly more than comparably sized cable operators are required to pay for the same programming. In some cases, NRTC is required by large, vertically-integrated satellite broadcast and programming vendors to pay up to **300%** or more than cable rates. Other C-Band MVPDs submitted Comments reflecting similar experiences.

The cable industry ignores these competitive problems. Viacom submitted no Comments. EMI, UVI and Netlink submitted no Comments. Time Warner, HBO and Primestar simply claim that competition is thriving. In fact, serious Program Access problems have survived the 1992 Cable Act. MVPDs are unable to compete with cable on a level playing field, as envisioned by Congress.

To combat these problems, the Commission should banish the type of exclusivity arrangements represented by the USSB/Time Warner/Viacom deal and should make it clear that significant damages will be awarded by the Commission for price discrimination and other Program Access violations.

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TO: The Commission

**REPLY COMMENTS
OF THE
NATIONAL RURAL TELECOMMUNICATIONS COOPERATIVE**

The National Rural Telecommunications Cooperative ("NRTC"), by its attorneys, hereby submits these Reply Comments, pursuant to Sections 1.415 and 1.430 of the rules and regulations of the Federal Communications Commission ("FCC" or "Commission"), in response to Comments filed in connection with the Commission's Notice of Inquiry ("Notice"), released in the above-captioned proceeding on May 19, 1994.^{1/}

^{1/} Notice of Inquiry, FCC 94-119 (released May 19, 1994).

I. BACKGROUND

1. Since its incorporation in 1986, NRTC has been fighting on Capitol Hill and at the Commission for fair access to satellite delivered programming. Following six years of efforts by NRTC and other Multichannel Video Programming Distributors ("MVPDs") using alternative delivery technologies to compete with cable, Congress overrode a Presidential Veto in 1992 and enacted the Cable Consumer Protection and Competition Act of 1992 (the "1992 Cable Act"). The "Program Access" provisions of the 1992 Cable Act were designed by Congress to create a level playing field for all MVPDs.

2. The 1992 Cable Act directed the FCC to establish rules prohibiting exclusive arrangements which prevent MVPDs from obtaining programming for distribution to persons in areas not served by cable. 47 U.S.C. 548(c)(2)(C).^{2/} The Commission also was directed to prohibit discrimination in the price, terms and conditions of sale or delivery of satellite programming. 47 U.S.C. 548(c)(2)(B). The Commission was directed further to report to Congress on the status of competition in the market for the delivery of video programming, which is the subject of the instant proceeding. 47 U.S.C. 544(g).

^{2/} The Commission's implementing rule, which fails to prohibit exclusive arrangements not involving a cable operator, is the subject of NRTC's pending Petition for Reconsideration in MM Docket No. 92-265 (Program Access Proceeding), June 10, 1993. 47 C.F.R. 76.1002(c)(1).

3. Notwithstanding the Program Access requirements of the 1992 Cable Act, the Comments submitted by NRTC and other MVPDs in this proceeding reveal that there are still severe competitive problems existing in the video programming market. As an MVPD serving rural areas of the country through Direct Broadcast Satellite ("DBS") and Home Satellite Dish ("HSD") C-Band technologies, NRTC noted that major barriers have survived the 1992 Cable Act and continue to prevent NRTC from obtaining access to satellite delivered programming from vertically-integrated programmers on fair and nondiscriminatory terms and conditions. Access to DBS programming is blocked, and pricing discrimination remains unchecked in C-Band. As a result, consumer choice is artificially restricted. Competition is reduced, and retail prices are unnecessarily inflated.

4. In light of NRTC's Comments and similar Comments by other aggrieved MVPDs, the cable industry generally argues in this proceeding that the video programming market is fully competitive. As shown by NRTC and other MVPDs, however, the basic Program Access problems identified by Congress in the 1992 Cable Act remain largely uncorrected.

II. REPLY COMMENTS

A. Time Warner and Viacom Refuse to Make Their Programming (HBO, Showtime, The Movie Channel, Cinemax, MTV, VH-1, Comedy Central, Nickelodeon and Flix) Available for Distribution by NRTC via DBS.

5. DBS technology has the potential to provide serious competition to the cable industry. As described in NRTC's Comments, however, NRTC has no access whatsoever -- at any price -- to the popular programming of Time Warner and Viacom for distribution via DBS. Why? Because Time Warner and Viacom have entered into exclusive, anti-competitive program distribution arrangements with United States Satellite Broadcast Co., Inc. ("USSB") for the specific purpose of blocking access to programming by NRTC and DirecTV.

6. Instead of multiple MVPDs competing vigorously to provide a diversity of service offerings to DBS consumers, as envisioned by Congress, the USSB/Time Warner/Viacom exclusivity arrangement places the future of DBS solely in the hands of two large vertically-integrated cable programmers and USSB. The USSB/Time Warner/Viacom deal severely restricts consumer choice

and creates the most severe competitive problem facing the satellite delivered programming industry.^{3/}

7. DirecTV's Comments reflect NRTC's concerns regarding the adverse competitive impact of the Time Warner and Viacom exclusivity arrangement on the development of DBS. According to DirecTV, the Commission's "first, best path to transition itself out of the business of regulating cable rates" is to enable new MVPDs to compete effectively with cable by gaining access to critical vertically-integrated programming. (DirecTV Comments, p. 3). Under the USSB/Time Warner/Viacom exclusivity arrangement, however, consumers will be required to piece together program offerings of multiple DBS operators. DirecTV and NRTC will be effectively checkmated as DBS competitors to cable because they lack access to the critical programming services of Time Warner and Viacom. Consumers, ultimately, will pay the price in inconvenience and higher retail rates.^{4/} (DirecTV Comments, p. 9).

^{3/} Program Access is the video distribution equivalent of "equal access" in the telecommunications industry. Within the context of telecommunications, USSB's role in the USSB/Time Warner/Viacom arrangement would be analogous to pre-divestiture AT&T, with one service provider controlling access to the long-distance (or, in this case, programming) market.

^{4/} As mentioned in NRTC's Comments, for instance, USSB's DBS retail rate for HBO already exceeds by a wide margin the C-Band retail rate for HBO. (NRTC Comments, n. 31).

8. The cable industry itself remains free to distribute the Time Warner and Viacom programming that is unavailable to DirecTV and NRTC. A chart entitled "Programming Access," which depicts the availability of programming to USSB and the cable industry -- and the unavailability of programming to NRTC and DirecTV for distribution via DBS -- is attached hereto as Attachment "A."

9. As shown on Attachment "A," cable MSOs, including ATC (Time Warner) and Viacom, have full access to the Time Warner and Viacom programming for distribution over cable. The largest, cable controlled C-Band distributors (HBO, Showtime and Netlink) have access to the programming of Time Warner and Viacom. The cable industry's mid-powered satellite service, Primestar, has access to the programming of Time Warner and Viacom. The cable industry even has access to the Time Warner and Viacom programming for distribution via high powered DBS from a non-101° orbital location, which is exempt from USSB's exclusivity.

10. The cable industry has full access to the programming of Time Warner and Viacom for cable, for HSD, for mid-powered DBS and for high powered DBS distribution. Only DirecTV and NRTC are blocked by the USSB/Time Warner/Viacom exclusivity arrangement from accessing the Time Warner and Viacom programming for distribution via DBS. Through the

USSB/Time Warner/Viacom deal, the cable industry has managed to control and manipulate its most serious competitive threat: non cable-controlled DBS.

11. The cable industry ignores these severe, unfair competitive problems created by the USSB/Time Warner/Viacom deal. Viacom did not even submit Comments in this proceeding. Time Warner and HBO submitted Comments, but simply claim that the industry is developing competitively.^{5/} Primestar declares that it will face "competition" from multiple high powered DBS services but ignores the fact that competition by DirecTV and NRTC has been artificially restricted by Time Warner (a Primestar Partner) and Viacom (also one of the original Primestar Partners). (Primestar Comments, p. 3; Notice, p. 36, n. 90).^{6/}

^{5/} HBO even went so far as to state that "HBO has found that increased competition among video programming distributors has improved the penetration of HBO services in the marketplace. HBO and other video programming vendors, therefore, are encouraged to distribute their programming through as many technologies and as many viable distributors as possible." HBO Comments, p. ii. These Comments, of course, are directly contradicted by HBO's grant of exclusivity to USSB. Cf., HBO Comments, p. 13, n. 13. In fact, HBO has not sought to distribute its programming to "as many viable distributors as possible." Instead, HBO has prevented NRTC and DirecTV from obtaining access to HBO programming.

^{6/} USSB, for its part, submitted no Comments addressing its exclusivity deal with Time Warner and Viacom but instead filed -- only one day before the Comment due date -- an "Emergency Motion for Extension of Time" to file Comments. Cf., 47 C.F.R. 1.46(b).

12. Collectively, these Commenters ignore the fact that the cable industry has access to Time Warner and Viacom programming (for distribution by cable, HSD and mid-power and high-power DBS) while NRTC's and DirecTV's access via DBS is blocked. They fail to discuss the effect of the USSB/Time Warner/Viacom exclusivity deal on consumer choice or on the development of DBS as a competitive threat to cable.

B. Discrimination by Vertically-Integrated Programmers Remains a Serious Competitive Problem in C-Band and Other Distribution Markets.

13. C-Band. In the C-band market, price discrimination by vertically integrated programming vendors remains the primary Program Access problem. To the extent permitted under confidentiality restrictions, NRTC described in its Comments how large, vertically integrated satellite broadcast and cable programming vendors require NRTC to pay 300% or more than cable rates for C-band distribution rights.

14. None of the vertically-integrated satellite broadcast programming vendors identified by NRTC in its Comments -- Eastern Microwave, Inc. ("EMI"), United Video, Inc. ("UVI"), or Netlink -- submitted Comments in response to the Commission's Notice. Nor did the vertically-integrated cable programmers --

Time Warner and Viacom (owners of Comedy Central)^{17/} -- address the C-Band price discrimination issue.

15. Almost across-the-board, however, other MVPDs described experiences similar to NRTC's. The basic Program Access provisions of the 1992 Cable Act, which were designed by Congress to prohibit price and other discrimination by vertically-integrated programmers, are not working for C-Band or other distribution technologies.

16. Other MVPDs. Consumer Satellite Systems, Inc., Programmers Clearing House, Inc., and Satellite Receivers, Ltd. (the "Packagers") compete with cable operators and other HSD packagers throughout the United States. In many respects, the Comments of the Packagers reflect the experiences of NRTC as a C-Band distributor. According to the Packagers, the prices they are charged by vertically-integrated programmers are "ridiculously high" relative to the rates paid by cable systems. The Packagers attached an Exhibit to their Comments which graphically depicts the unfair differentials between HSD rates and the highest cable rates of some programmers.

^{17/} Viacom also previously held an ownership interest in Lifetime.

17. Liberty. Liberty Cable Company, Inc. ("Liberty") described its successful prosecution of a Program Access Complaint against Time Warner, finally resulting in Liberty's access to Court TV. Liberty stated flatly that effective competition "does not currently exist in the MVPD market." (Liberty Comments, p. 5). In Liberty's view, the entrenched cable monopolists "continue to dominate the industry and competition has been effectively quashed." (Liberty Comments, p. 27).

18. Wireless Cable. Peoples Choice TV Corporation ("PCTV"), a wireless cable operator, described how the cable industry seems "unbowed" by the cable regulations. PCTV argued that the cable industry intends to use exclusivity as a major weapon against competition. (PCTV Comments, p. 2).^{8/}

19. LMDS. CellularVision of New York, L.P., the only commercial Local Multipoint Distribution Service ("LMDS") system in the country, noted the "gross lack of competition" found in today's cable marketplace and argued that the best means for the Commission to regulate the cable monopoly is through competition in the MVPD marketplace. (CellularVision Comments, p.3)

^{8/} The Wireless Cable Association International, Inc., noted that competition from wireless cable has improved following the 1992 Cable Act but requested that the Commission fine tune its rules to eliminate unintended impediments.

20. The Cable Industry. None of these competitive concerns raised in the Comments of numerous MVPDs are addressed by the cable industry in this proceeding. EMI, UVI and Netlink submitted no Comments. Viacom submitted no Comments. Time Warner submitted Comments, but did not address the discrimination issue in any meaningful way. Instead, the cable industry simply takes the position that the video programming market is developing competitively and that Government oversight is unnecessary and overblown. "The multi-channel competitive environment that Congress envisioned is emerging" (NCTA Comments, p. 5). The Comments of competing MVPDs, however, show quite clearly that this is not the case.

II. CONCLUSION

21. Serious Program Access problems have survived the 1992 Cable Act and must be corrected by the Commission. The vertically-integrated cable industry continues to stifle competition by denying access to DBS programming and by discriminating in price against C-band and other distribution technologies. Many of the basic Program Access problems identified by Congress in the 1992 Cable Act remain uncorrected.

22. To combat these problems, the Commission should banish the type of exclusivity arrangements represented by the USSB/Time Warner/Viacom deal

and should make it clear that significant damages will be awarded by the Commission for Program Access violations.

WHEREFORE, THE PREMISES CONSIDERED, the National Rural Telecommunications Cooperative urges the Commission to consider these Reply Comments and to proceed in a manner consistent with the views expressed herein.

Respectfully submitted,

**NATIONAL RURAL
TELECOMMUNICATIONS COOPERATIVE**

**B.R. Phillips, III
Chief Executive Officer**

**Steven T. Berman
Corporate Counsel**

By: John B. Richards
**John B. Richards
Keller and Heckman
1001 G Street, N.W.
Suite 500 West
Washington, D.C. 20001
(202) 434-4210**

Its Attorneys

Dated: July 29, 1994

PROGRAMMING ACCESS

Attachment A

Access to Programming Controlled by Vertically Integrated Cable Companies

PROGRAMMER	DIRECTV™	USSB *	PrimeStar *	3 LARGEST * C-BAND DISTRIBUTORS (HBO, Showtime, Netlink (TCI))	Cable * MSOs (ATC/VIACOM)
Cinemax		X	X	X	X
Flix	ACCESS	X	X	X	X
HBO		X	X	X	X
The Movie Channel	BLOCKED	X	X	X	X
Showtime	BY	X	X	X	X
Comedy Central		X	X	X	X
MTV	EXCLUSIVE	X	X	X	X
VH1	CONTRACTS	X	X	X	X
Nickelodeon		X	X	X	X
Lifetime	X	X	X	X	X
American Movie Classics	X	X	X	X	X
BET	X	X	X	X	X
Bravo	X	X	X	X	X
Cartoon Network	X	X	X	X	X
Country Music TV	X	X	X	X	X
CNN/Headline News	X	X	X	X	X
Court TV	X	X	X	X	X
Discovery Channel	X	X	X	X	X
E! Entertainment TV	X	X	X	X	X
Encore	X	X	X	X	X
Family Channel	X	X	X	X	X
Fox Network	X	X	X	X	X
Home Shopping Network	X	X	X	X	X
The Learning Channel	X	X	X	X	X
QVC	X	X	X	X	X
Q2	X	X	X	X	X
The Nashville Network	X	X	X	X	X
Sci-Fi Channel	X	X	X	X	X
TNT	X	X	X	X	X
Travel Channel	X	X	X	X	X
Turner Classic Movies	X	X	X	X	X
USA Network	X	X	X	X	X
The Weather Channel	X	X	X	X	X

* CROSS OWNERSHIP INTERESTS WITH
USSB/TIME WARNER/VIACOM